UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-PJC **THE CARGILL DEFENDANTS' REPLY IN SUPPORT OF THEIR PARTIAL JOINDER IN PETERSON FARMS, INC.'S MOTION IN LIMINE REGARDING POULTRY WATER QUALITY HANDBOOK (DKT. NO. 2439)**

Cargill, Inc. and Cargill Turkey Production, LLC ("the Cargill Defendants") offer the following reply in support of their partial joinder (at Dkt. No. 2439) in Peterson Farms, Inc.'s Motion in Limine Regarding Poultry Water Quality Handbook (Dkt. No. 2396) and related errata (Dkt. No. 2437). The Cargill Defendants joined the statements, arguments, and authorities contained in that motion and errata with the express exception of arguments specific to Peterson Farms, Inc.'s employees and former employees found at pages 2-3 and 5-6 of the original motion (see Dkt. No. 2439 at 1), and likewise incorporate by reference here all arguments not specific to Peterson Farms asserted in its reply in support of the motion (Dkt. No. 2554).

Plaintiffs oppose the Cargill Defendants' joinder in the motion, yet insist that the Poultry Water Quality Handbook ("PWQH") "is admissible against all defendants" for a variety of reasons. (Dkt. No. 2513 at 1.) Peterson Farms' reply to Plaintiffs' response on these issues adequately addresses the points made in paragraph 2 of Plaintiffs' Cargill-specific response (Dkt. No. 2513 at 1, referencing Plaintiffs' main opposition brief at pages 3-4 of Dkt. No. 2505). Cargill joins in that reply rather than repeating it here.

The remainder of Plaintiffs' brief alleges that Cargill, Inc. "clearly adopted the statements" in the Handbook and "direct[ly] adop[ed] … the content of the" Handbook. (Dkt.

No. 2513 at 2.) Plaintiffs contend that the material qualifies as a nonhearsay admission by a party-opponent under Federal Rule of Evidence 801(d)(2), and under the Rule 804(b)(3) hearsay exception as a statement against interest. Neither Rule is apt and none of the State's arguments are well taken.[1] The Court should exclude the Handbook because it is non-probative hearsay with a dangerous propensity to cause jury confusion and to unfairly prejudice the Cargill Defendants.

To support their adoption claim, Plaintiffs cite a February 16, 1999 cover letter from H. Doyle Morrow, an agricultural manager from a Cargill turkey operation located nowhere near the IRW. (Dkt. No. 2513-2: CARTP142784.) As the document itself indicates, at that time, Mr. Morrow was at Cargill's California, Missouri facility. (Id.; Dkt. No. 2079-4: Alsup Dep. at 200:10 – 203:4; Dkt. No. 2200-2: Maupin Dep. at 458:24 – 459:7.) Mr. Morrow sent the second version of the PWQH with a cover letter **only** to growers in Missouri. There is no indication that anyone at Cargill provided growers located anywhere else in the country – let alone located in the IRW – with a copy of the PWQH at any time. (See id., especially Dkt. No. 2079-4: Alsup Dep. at 201:10-16: "Q: [D]o you know whether or not growers in the IRW … were provided a copy of Exhibit 25 [the PWQH] at any time? A: No, sir, they were not. They were not provided a copy through Cargill. If they got a copy of it, it was on their own through their own resources.")

First, Plaintiffs ask too much. Mr. Morrow's letter and limited distribution of one version of the PWQH does not amount to such an "admission" under Rule 801(d)(2) that the Court can find that Cargill, Inc. "direct[ly] adop[ed] … the content of the" Handbook as Plaintiffs contend.

[1] Cargill also adopts here the hearsay arguments presented by Peterson Farms, Inc. on reply to the extent they are not specific to Peterson Farms, Inc. (Dkt. No. 2554 at 1-4.)

(Dkt. No. 2513 at 2.) As the offering party, Plaintiffs carry the burden of proving that this evidence constitutes a party admission. Simpson v. Saks Fifth Ave, Inc., 2008 U.S. Dist. LEXIS 60480, at *12-13 (N.D. Okla. Aug. 8, 2008). They have not met that burden. This is not a situation where a high ranking corporate member authorized to bind the whole company approved the document for broad or official use. Cf. Fischer v. Forestwood Co., 525 F.3d 972, 984 (10th Cir. 2008); see also Fed. R. Evid. 801(d)(2)(C). The reality is that one person sent the PWQH to growers within one distinct area in the country. The absence of any suggestion that anyone at Cargill distributed the PWQH or made any statements about it to growers outside of the California, Missouri area demonstrates that Mr. Morrow's letter is not the broad sweeping adoption that Plaintiffs try to make of it. Rather, Mr. Morrow's letter and distribution were directed only at a small subset of growers that fell within his narrow managerial authority, and no further. The Court should not permit the State to attribute to Mr. Morrow's statements a reach beyond the scope of his employment. See Fed. R. Evid. 801(d)(2)(D). Further, the limited, regional nature of the distribution tends to show that Cargill, Inc. did not endorse the materials. See Fed. R. Evid. 801(d)(2)(B). The letter is not probative regarding growers or geography beyond the California, Missouri ambit, and Plaintiffs should not be allowed to offer the jury this singular action as a corporate-wide direct adoption of the PWQH.

As there is no sign that anyone at Cargill distributed the PWQH to its growers across the country, and because no grower in the IRW ever received Mr. Morrow's letter or the PWQH, the jury could easily be confused and misled regarding to the import of this evidence. The minimal probative value of Mr. Morrow's letter and distribution in Missouri is greatly outweighed by the possibility for jury confusion and undue prejudice to Cargill, Inc. See Fed. R. Evid. 403.

Plaintiffs likewise cannot justify admission of the handbook under Federal Rule of

Evidence 804(b)(3). Rule 804(b)(3) excepts from the hearsay bar a "statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability … that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Again, Plaintiffs carry the burden to show Mr. Morrow's letter and the copy of the Handbook at issue qualify as a statement against interest. E.g., United States v. Spring, 80 F.3d 1450, 1461 (10th Cir. 1996). "The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Fed. R. Evid. 804(b)(3) advisory committee's note (1972) (citing Hileman v. Nw. Eng'g Co., 346 F.2d 668 (6th Cir. 1965)). Whether a statement was in fact against interest when made "must be determined from the circumstances of each case," id., and such determinations are not made lightly. Thus, that even "a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to quality as against interest." Id.

Here, even if the statements contained with the PWQH could fairly be considered statements by Cargill – which they cannot – there is no indication that at the time made they were at all contrary either to Mr. Morrow's interest or to Cargill's, let alone "so far contrary" to lend the statements the required "circumstantial guaranty of reliability." Rather, the PWQH reflects some suggested good management practices from a snapshot in time and from all circumstances do not appear to have been made against *anyone's* pecuniary or proprietary interest. Nor at the time were the statements in the PWQH or letter "so far tended to subject the declarant [be it Mr. Morrow or even Cargill, Inc.] to civil or criminal liability … that a reasonable person in the declarant's position would not have made the statement unless believing

it to be true." See Fed. R. Evid. 804(b)(3). In short, this hearsay exception cannot save this document from its inadmissibility as to Cargill and the Court should exclude the document. See, e.g., United States v. Porter, 881 F.2d 878, 883-84 (10th Cir. 1989) ("Rule 804(b)(3) is based on the guaranty of trustworthiness which accompanies a statement against interest. *To the extent that a statement is not against the declarant's interest, the guaranty of trustworthiness does not exist and that portion of the statement should be excluded*.") (emphasis in original, quotation omitted).

CONCLUSION

For all of the above reasons and those set forth at Docket Nos. 2396 and 2554, the Court should find that Mr. Morrow's February 16, 1999 letter to contract growers in Missouri does not constitute a wide-sweeping "direct adoption of the content of the PWQH by Cargill, Inc.," nor does it qualify as a Cargill, Inc. party admission under Rule 801(d)(2) or a statement against Cargill's interest under Rule 804(b)(3). The limited probative value of this evidence – if any – is far outweighed by its propensity to cause jury confusion and thus to unduly prejudice the Cargill Defendants at trial. The Court should exclude this evidence accordingly.

Dated: September 3, 2009.

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, PLLC

By: /s/ John H. Tucker
John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
100 W. Fifth St., Ste. 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Tel: (918) 582-1173
Fax: (918) 592-3390

FAEGRE & BENSON LLP
Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Tel: (612) 766-7000
Fax: (612) 766-1600

Attorneys for Defendants Cargill, Inc. and Cargill Turkey Production, LLC

CERTIFICATE OF SERVICE

I certify that on the 3rd day of September, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General — drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General — kelly_burch@oag.state.ok.us

Melvin David Riggs — driggs@riggsabney.com
Joseph P. Lennart — jlennart@riggsabney.com
Richard T. Garren — rgarren@riggsabney.com
Sharon K. Weaver — sweaver@riggsabney.com
Robert Allen Nance — rnance@riggsabney.com
Dorothy Sharon Gentry — sgentry@riggsabney.com
David P. Page — dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis, P.C.

Louis W. Bullock — lbullock@bullock-blakemore.com
Bullock, Bullock and Blakemore, PLLC

William H. Narwold — bnarwold@motleyrice.com
Frederick C. Baker — fbaker@motleyrice.com
Lee M. Heath — lheath@motleyrice.com
Elizabeth Claire Xidis — cxidis@motleyrice.com
Fidelma L Fitzpatrick — ffitzpatrick@motelyrice.com
Mathew P. Jasinski — mjasinski@motleyrice.com
Motley Rice LLC
COUNSEL FOR PLAINTIFFS

A. Diane Hammons — diane-hammons@cherokee.org
Attorney General, Cherokee Nation
COUNSEL FOR INTERVENER, CHEROKEE NATION

Stephen L. Jantzen — sjantzen@ryanwhaley.com
Paula M. Buchwald — pbuchwald@ryanwhaley.com
Patrick Michael Ryan — pryan@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.

Mark D. Hopson — mhopson@sidley.com
Jay Thomas Jorgensen — jjorgensen@sidley.com
Timothy K. Webster — twebster@sidley.com
Gordon D. Todd — gtodd@sidley.com
Erik J. Ives — eives@sidley.com
Cara R. Viglucci Lopez — cvigluccilopez@sidley.com
Sidley Austin LLP

L Bryan Burns — bryan.burs@tyson.com
Robert W. George — robert.george@tyson.com
Michael R. Bond — michael.bond@kutakrock.com
Erin W. Thompson — erin.thompson@kutakrock.com

Dustin R. Darst dustin.dartst@kutakrock.com
Kutack Rock LLP
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin jgriffin@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
William D. Perrine wperrine@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C .Senger dsenger@pmrlaw.net
Gregory A. Mueggenborg gmueggenborg@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
Vincent O. Chadick vchadick@bassettlawfirm.com
K. C. Dupps Tucker kctucker@bassettlawfirm.com
Bassett Law Firm
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole M. Longwell nlongwell@mhla-law.com
Philip D. Hixon phixon@mhla-law.com
Craig Mirkes cmirkes@mhla-law.com
McDaniel, Hixon, Longwell & Acord, PLLC

Sherry P. Bartley sbartley@mwsgw.com
Mitchell Williams Selig Gates & Woodyard

COUNSEL FOR PETERSON FARMS, INC.

Michael D. Graves mgraves@hallestill.com
Dale Kenyon Williams, Jr. kwilliams@hallestill.com
COUNSEL FOR CERTAIN POULTRY GROWERS

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green
Sidley Austin Brown & Wood LLP
1501 K Street NW
Washington, DC 20005
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

s/ John H. Tucker